In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. [redacted] 10

MABEL GILLESPIE,
Administratrix of the Estate of Daniel E. Gillespie,
Deceased,
Petitioner,

vs.

UNITED STATES STEEL CORPORATION,
a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on July 29, 1963, printed in Appendix C hereto, *infra*, at p. 39.

THE OPINIONS BELOW.

The district court opinion is unreported and is printed in Appendix C hereto, *infra*, at pp. 37-38. The opinion of the Sixth Circuit Court of Appeals is also unreported and a copy has been attached as a part of Appendix C, following page 39 hereof.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered in the subject case on July 29, 1963, affirming the order of the United States District Court for the Northern District of Ohio, Eastern Division, which struck from petitioner's complaint all allegations relating to the general maritime law doctrine of unseaworthiness and the Ohio Wrongful Death Act. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

I. Whether suit for wrongful death of a deceased seaman may be maintained against his employer under the general maritime law doctrine of unseaworthiness and the state statute which provides a remedy for wrongful death, where the death occurred in state waters.

II. Whether the classes of beneficiaries named in the Jones Act are mutually exclusive, so that, in a wrongful death action, the existence of a person in one such class precludes recovery by persons in the other class.

III. Whether a claim for conscious pain and suffering against his employer survives the death of a seaman, where the period of pain and suffering for which compensation is claimed is short and immediately preceded his death by drowning.

STATUTES INVOLVED.

The statutes involved are Section 33 of the Merchant Marine Act of 1920, 41 Stat. 1007, 46 U. S. C. Section 688, incorporating the Federal Employers' Liability Act, 45 U. S. C. Section 51, the Ohio Wrongful Death Act, Ohio Revised Code Sections 2125.01 and 2125.02, and the Ohio Survival Statute, Ohio Revised Code Section 2305.21. They are reprinted in Appendix A, *infra*, at pp. 22-25.

STATEMENT OF THE CASE.

Petitioner, Mabel Gillespie, as administratrix of the estate of her deceased son, Daniel E. Gillespie, filed an amended complaint in the District Court against the Respondent, United States Steel Corporation, for damages arising out of the death of her decedent in Ohio waters while employed by the Respondent as a seaman and a member of the crew of one of Respondent's steamships, engaged in transportation as a cargo carrier on the Great Lakes (25-30). Jurisdiction of the district court was invoked because the complaint raised questions under a law relating to admiralty and commerce, the Merchant Marine Act of 1920 (Jones Act) and the general federal maritime law. Petitioner's amended complaint sought recovery (1) for herself as dependent mother of the decedent, and for the benefit of her children, dependent sisters and brother of the decedent, for *wrongful death*, and (2) for the estate of the decedent for his *conscious pain and suffering* immediately prior to his death by drowning (29-30). She sought recovery for wrongful death on alternate grounds of (1) the Merchant Marine Act of 1920 (Jones Act), and (2) the general maritime law of unseaworthiness coupled with the Ohio Wrongful Death Act, and for decedent's conscious pain and suffering based upon the alternate theories of liability of (1) the

survival provisions of the Merchant Marine Act of 1920 (Jones Act), and (2) the general maritime law of unseaworthiness coupled with the Ohio Survival Statute.

Respondent filed a motion requesting the trial court to strike all allegations relating to the general maritime doctrine of unseaworthiness, the Ohio Wrongful Death and Survival Statutes, and the dependent sisters and brother of the decedent as beneficiaries, from the complaint (30-32). The district court granted Respondent's motion to strike in its entirety (38).

Petitioner appealed from this order to the Sixth Circuit Court of Appeals. Respondent filed a motion to dismiss the appeal on the ground that the order appealed from was not final and appealable. Before the Court of Appeals heard the motion to dismiss, Petitioner and the other named beneficiaries for whom she sued filed a petition for extraordinary relief in the event that the Court of Appeals should rule that the order of the district court from which appellate relief was sought was not final and appealable (32-36). Both the appeal and the application for extraordinary relief were consolidated in the Court of Appeals (38).

With the appellate proceedings in this posture, the Court of Appeals ruled as follows:

(1) The court denied the Respondent's motion to dismiss the appeal (38).

(2) The court affirmed the order of the district court below on its merits (39).

(3) The court denied the petition for extraordinary relief (39).

It is the affirmance on its merits of the district court order below from which Petitioner seeks relief by this petition for certiorari.

REASONS FOR GRANTING THE WRIT.

I.

The opinion of the Sixth Circuit Court of Appeals from which Petitioner here seeks relief is based upon, and revitalizes, the position taken by this Court in *Lindgren v. United States*, 281 U. S. 38 (1930), that the Jones Act[1] provides the exclusive remedy for death of a seaman against his employer and that therefore the unseaworthiness of the vessel, irrespective of negligence, is unavailable as an alternate basis for recovery for the seaman's death, even though such claim is predicated upon the wrongful death statute of the state in which the injury causing death occurred.

In response to the Petitioner's contention in the court below that the position taken in *Lindgren* on this point is unsound, and has been eroded by more recent decisions of this Court in contiguous areas, the Court of Appeals remarked:

> "* * * if the prior rule is no longer accepted by the Supreme Court, and *Lindgren v. United States* * * * is to be overruled, the landmarks must be plainer to see; and it would be unbecoming for this Court to base its determination upon the assumption that the holding in *Lindgren* is to be reversed." (Page 18, Court of Appeals' Opinion, Appendix C.)

Petitioner contends that at its inception the rule in *Lindgren* on this point was indefensible logically, that subsequent experience has stripped *Lindgren* of any vitality it may have had, and that this case presents a long overdue opportunity to this Court to re-examine and discard an unjust, unwarranted and overly-harsh rule delineating the rights of survivors of a seaman whose death resulted from a maritime tort.

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[1] Section 33 of the Merchant Marine Act of 1920, 46 U. S. C. § 688.

Prior to the enactment of the Jones Act, the courts had established that the general maritime doctrine of unseaworthiness *did* provide a theory of recovery for wrongful death, both in seamen's suits against their employers and otherwise, by utilizing the state wrongful death statute in whose jurisdiction the death occurred to supply a remedy for death to complement the substantive general maritime doctrine of unseaworthiness. *The Hamilton*, 207 U. S. 398 (1907); *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U. S. 479 (1923); and see *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 371 (1932); *Western Fuel Co. v. Garcia*, 257 U. S. 233 (1921).

Moreover, both the Jones Act and the Death on the High Seas Act, 41 Stat. 537, 46 U. S. C. Section 761-768, which provided a remedy for wrongful death where the death occurred beyond a marine league from state shores, were enacted in 1920 at the same session of Congress. That this act was intended by *the same Congress that enacted the Jones Act* to fill a void in wrongful death recovery and to *supplement* the state wrongful death remedies rather than *eliminate* them is clearly demonstrated by the express statutory direction in the Death on the High Seas Act "that the provisions of any state statute giving or regulating rights of action or remedies for death *shall not be affected by this Act.*" (emphasis supplied.) Accord: *Western Fuel Co. v. Garcia*, 257 U. S. 233, 243 (1921).[2]

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[2] And see Mr. Justice Stewart's language in the majority opinion in *The Tungus, et al. v. Skovgaard*, 358 U. S. 588, 593 (1959):

> "The legislative history of the Death on the High Seas Act discloses a clear congressional purpose to leave 'unimpaired the rights under state statutes as to deaths on waters within the territorial jurisdiction of the States.' S. Rep. No. 216, 66th Cong., 1st Sess. 3; H. R. Rep. No. 674, 66th Cong. 2d Sess. 3. The record of debate in the House of Representatives preceding passage of the bill reflects deep concern that the power of the States to create actions for wrongful death in no way be affected by enactment of the federal law. 59 Cong. Rec. 4482-4486."

It is evident that the Jones Act was enacted to *enhance* rather than *diminish* the rights of the seaman and his personal representative in the event of his injury or death in the course of his employment. As Justice Brennan, speaking for Chief Justice Warren and Justices Black, Douglas and Clark in *Kernan, Adm'x. v. American Dredging Co.*, 355 U. S. 426, 431-432 (1959), has described the background of the enactment of such special industrial legislation as the Federal Employers' Liability Act, and the Jones Act, into which the F. E. L. A. is specifically incorporated:

> "It is true that at common law the liability of the master to his servant was founded wholly on tort rules of general applicability and the master was granted the effective defenses of assumption of risk and contributory negligence. This limited liability derived from a public policy, designed to give maximum freedom to infant industrial enterprises, 'to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost—to someone—of the doing of industrialized business.' *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 59. But it came to be recognized that, whatever the rights and duties among persons generally, the industrial employer had a special responsibility toward his workers, who were daily exposed to the risks of the business and who were largely helpless to provide adequately for their own safety. Therefore, as industry and commerce became sufficiently strong to bear the burden, the law, the reflection of an evolving public policy, came to favor compensation of employees and their dependents for the losses occasioned by the inevitable deaths and injuries of industrial employment, thus shifting to industry the 'human overhead' of doing business. For most industries this change has been embodied in Workmen's Compensation Acts. In the railroad and shipping industries, however, the FELA and Jones Act provide the framework for determining liability for industrial accidents. But instead of a detailed statute codifying com-

> mon law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. *But it is clear that the general congressional intent was to provide liberal recovery for injured workers, Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 508-510, and *it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers.*" (Emphasis supplied.)

In this context came *Lindgren v. United States*, 281 U. S. 38 (1930). Although this was solely a Jones Act death case in which unseaworthiness was never pleaded as a basis for liability, the Court took occasion to remark that the Jones Act wrongful death remedy was exclusive and precluded recovery for death by reason of the unseaworthiness of the vessel.

Justice Brennan, concurring in part and dissenting in part on other facts in *The Tungus et al. v. Skovgaard, Adm'x*, 358 U. S. 588, 606 (1959), acknowledged that the proposition of *Lindgren* upon which Respondent and the court below rely was *obiter*:

> "The opinion [in *Lindgren v. United States*] dealt primarily with the effect of the Jones Act's wrongful death provision in removing the seaman's right to invoke the remedies of state Death Acts for the identical gravamen of negligence. And, *although the libel did not allege unseaworthiness*, the Court *briefly observed* that the Jones Act's death provision would be construed equally as foreclosing a state statute's use on that count." (Emphasis supplied.)

This *dictum* in *Lindgren*, neither called for by the issues in the case nor responsive to the demonstrated congressional

intent and federal statutory enactments, has, it is true, been followed by some inferior federal courts, but even those courts which unjustifiably, in Petitioner's view, have felt bound by it, have followed it protestingly, haltingly, and crying out against its logical barrenness and basic injustice. E.g., *Fall, Adm'x. v. Esso Standard Oil Co.*, 297 F. 2d 411, 417 (5th Cir. 1961):

> "We feel compelled to hold that the general maritime law, unaided by the Jones Act, *anomalously, archaically, unnecessarily* in terms of general principles, gives [plaintiff] no right of action." (Emphasis supplied.)

And in *Gill v. United States*, 184 F. 2d 49, 57 (2nd Cir. 1950), Judge Learned Hand attacked the logical basis of the dictum in *Lindgren* with unassailable force:

> "Is a vessel owner liable for a seaman's * * * death within the territorial waters of a state, when it is caused by the unseaworthiness of the vessel? I have no doubt that the death was owing to the respondent's 'wrongful act, neglect or default,' as the New Jersey Act uses those words; but in *Lindgren v. United States*, 281 U. S. 38 * * *, the Supreme Court held that the Jones Act, 46 U. S. C. A. § 688, superseded a state statute creating such a claim. * * * Since then, the Court has indeed decided that a seaman may recover for injuries suffered from the ship's unseaworthiness, *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, 100 * * *, and the same is true of longshoremen, *Seas Shipping Co., v. Sieracki*, 328 U. S. 85 * * * I find it hard to understand why the rationale of *Lindgren v. United States, supra*, ought not to have forbidden recovery in either of these instances. If the Jones Act 'covers the entire field of liability for injuries to seamen' and 'is paramount and exclusive,' why does it not supersede injuries arising from unseaworthiness which do not result in death, as well as

> those which do? * * * *Yet I must own to the greatest doubt whether the Court would today so hold.*" (Emphasis supplied.)

Nor have subsequent decisions of this Court added luster to the precedent value of *Lindgren*. Although the Court has not decided a case dealing specifically with the question of whether a seaman's death action may be brought on both Jones Act and unseaworthiness counts,[3] a number of subsequent decisions of this Court in contiguous areas have cast serious doubt upon *Lindgren* as binding legal authority today.

While the rationale of *Lindgren* was based upon the view that a seaman was required to 'elect' whether to pursue a negligence recovery under the Jones Act or recover under the general maritime doctrine of unseaworthiness, this rug has been pulled from under *Lindgren's* feet as well. Since that case was decided, it has become clear that a seaman need *not* elect between Jones Act negligence and unseaworthiness, but may proceed to judgment alternatively on both and his verdict will be sustained on appeal if there is no demonstrable prejudicial error as to one of them. *McAllister v. Magnolia Petroleum Co.*, 357 U. S. 221 (1958).

Moreover, wrongful death actions may be maintained against the vessel owner by representatives of deceased

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[3] The closest it has come to considering this point since *Lindgren* is in *Kernan, Adm'r. v. American Dredging Co.*, 355 U. S. 426, 429 (1958):

> "The petitioner assumes that under today's general maritime law the personal representative of a deceased seaman may elect, as the seaman himself may elect, between an action based on the FELA and an action, recognized in *The Osceola*, 189 U. S. 158, 175, based upon unseaworthiness. *In view of the disposition we are making of this case, we need not consider the soundness of this assumption.*" (Emphasis supplied.)

employees for negligent failure to comply with the absolute duty to furnish a seaworthy vessel[4] and for non-negligent violations of coast guard regulations.[5]

An action against the vessel owner based upon the applicable state wrongful death statute and the general maritime doctrine of unseaworthiness may be maintained for death of a *non-seaman* employed aboard a vessel at the time of his death.[6] Nor does the Jones Act provide such an exclusive remedy to seamen as to preclude recovery for unseaworthiness for a seaman's personal injury if his injuries are not severe enough to cause his death.[7] Claims against a shipowner-employer based upon unseaworthiness for conscious pain and suffering for injuries accrued prior to the decedent-seaman's death survive.[8] Claims for maintenance and cure survive the death of the seaman.[9] And the intentions of this Court to grant similar remedies for substantive rights arising out of the same maritime wrong has been very recently demonstrated.[10]

As a consequence of these holdings, there remains but one set of facts in which all general maritime rights are

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[4] *Michalic v. Cleveland Tankers*, 364 U. S. 325 (1960); *Vickers dba Delta Towing Co. v. Turney*, 290 F. 2d 426 (5th Cir. 1961); *Fall, Adm'x v. Esso Standard Oil Co.*, 297 F. 2d 411 (5th Cir. 1961).

[5] *Kernan, Adm'x. v. American Dredging Co.*, 355 U. S. 426 (1958).

[6] *The Tungus et al. v. Skovgaard, Adm'x*, 358 U. S. 588 (1959).

[7] *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, 100 (1944); *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946).

[8] *Holland v. Steag, Inc.*, 143 F. Supp. 203 (D. Mass. 1956); cf. *Just v. Chambers*, 312 U. S. 383 (1941).

[9] *Sperbeck v. A. L. Burbank & Co.*, 190 F. 2d 449 (2nd Cir. 1951).

[10] *Fitzgerald v. United States Lines Co.*, 31 U. S. L. Week 4626 (June 10, 1963).

not available to the victim of a maritime tort or his beneficiaries. This results only under circumstances, as in the instant case, where *all* of the following factors co-exist:

1. The victim must be injured severely enough to be killed.
2. The victim must be a seaman.
3. The victim's death must have occurred in state waters.
4. Suit must have been filed against the victim's employer.
5. The suit must be for wrongful death.

Thus, only *Lindgren* now stands in the path of the general tort proposition that all the rights which a claimant had before he died are available in some form to his personal representative upon his death.

This observation is not a compulsive plea for legal symmetry for its own sake. The vast philosophic gulf between *Lindgren* and the other decided cases "indicate[s] something wrong at the beginning or that something has become wrong since then. [It] also show[s] that correction, though in process, is incomplete * * *."[11]

The Court of Appeals in this case has, by its order of affirmance, refused to give relief from an anachronistic rule which interprets the Jones Act in such a manner as to diminish seamen's rights rather than to enhance them, and which grants fewer rights to the survivors of a seaman injured severely enough to die as a result of a maritime tort, than to one whose injuries were not so severe as to be fatal. Such patent unfairness, although members of this Court acknowledge that "[a]dmiralty law is primarily judge-made made law" and that "[t]he federal courts

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[11] *Georgetown College v. Hughes*, 130 F. 2d 810, 812 (D. C. Cir. 1942).

have a most extensive responsibility of fashioning rules of substantive law in maritime cases," [12] is justified by the court below, echoing the rationale of *Lindgren*, as follows:

> "Congress having, by the Jones Act, pre-empted the field relating to recovery of damages for the death of a seaman, that statute must be deemed to supersede all state legislation bearing on the subject and be the exclusive remedy in such a case." (Page 20, Court of Appeals' Opinion Appendix C.)

Without again discussing this erroneous interpretation of congressional intent with respect to the Jones Act,[13] the opinion of Mr. Justice Brennan, speaking for Chief Justice Warren and Justices Black and Douglas in another context, provides an abundant reply to the rationale of the Court of Appeals:

> "Though the individual statutes vary in terminology and to an extent in concept, all the States have wrongful death acts * * *. While the course of development of the common law has brought it about that this remedy has always been embodied in a statutory enactment, the existence of such a remedy is now a basic premise of the law of torts administered throughout the country. And with the Death on the High Seas Act and the state statutes, *the federal admiralty law has available a remedy to fashion for the fatal breach of a maritime duty anywhere within its jurisdiction.*
>
> "* * * the duty claimed to have been broken here [breach of duty of seaworthiness] was one grounded in federal law. It would be a strained statement of the effect of *The Harrisburg* [119 U. S. 199 (1886)] to say that there was no duty imposed by the maritime law not to kill persons through breach of the duty of

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[12] Brennan, J., concurring in part and dissenting in part in *The Tungus v. Skovgaard*, 358 U. S. 588, 605 (1959).

[13] See discussion, *supra*, pp. 6-8.

seaworthiness. The libel alleged a condition constituting *a breach of a federally defined duty* and set forth a cause of action under federal law, and this nonetheless because the breach of the federal duty had resulted in death rather than in non-fatal injury. *It is the federal maritime law that looks to the state law of remedies here, not the state law that incorporates a federal standard of care* * * *.

"The court's solution * * * creates potential differences in the availability of a remedy for breach of the federally created duty where the victim dies as opposed to cases where he is injured short of death * * *. I cannot think that any such variation is appropriate or necessary in the enforcement of the cause of action for unseaworthiness * * *. The existence of a remedy for wrongful death has become almost a postulate of our legal system, though the remedy was generally provided by legislation rather than by decisional law. It is against this background that the federal law must look for an appropriate remedy to enforce its duties in a complete and rational way. Cf. *Cox v. Roth*, 348 U. S. 210.

"* * * insofar as [wrongful death acts of states] have as their purpose the effecting of a general and rough equivalency between the duties for breach of which a remedy lies in the case of injuries causing death and those short of it, they can be proper subjects for the flexibility of the federal maritime law in fashioning a remedy for breach of the duty of seaworthiness.

"Admiralty law is primarily judge-made law. The federal courts have a most extensive responsibility of fashioning rules of substantive law in maritime cases * * *. This responsibility places on this Court the duty of assuring that the product of the effort be coherent and rational. Admiralty law is an area where flexibility and creativity have been demonstrated in accomplishing this. * * * the court announces the strange principle that *the substantive rules of law governing human conduct in regard to maritime torts*

> *vary in their origin depending on whether the conduct gives rise to a fatal or a non fatal injury.* I have demonstrated that it does so under no compulsion of binding precedent here or of Act of Congress. *Its anomalous result is purely of its own making.* Certainly the responsibility incumbent upon this court in this area demands more by way of fulfillment than the court has furnished * * *." (Emphasis supplied.)

That such unfair treatment should be limited to seamen, the special wards of the court,[14] while a non-seaman's death action may be based upon the general maritime law, outrages justice, offends history, and requires this Court to re-examine and discard *Lindgren* as a rule of law binding upon the courts below.

To the plea of the Court of Appeals below that "if *Lindgren v. United States* * * * is to be overruled, the landmarks must be plainer to see," this Court ought to respond by providing the clearly visible landmark sought by the court below: a clear rejection of *Lindgren*, and an explicit statement that, in an action against his employer for the wrongful death of a seaman in state waters, the wrongful death statute of the state may be used to provide an effective remedy for the violation of the federal maritime duty to keep vessels seaworthy, notwithstanding any other remedies for negligence under the Jones Act which may be available to his beneficiaries.

Such a result is clearly in the public interest, for so long as seamen are employed extensively in the hazardous industry of transportation by ship, so long as maritime torts occur which cause fatal injuries, so many persons will this Court's ruling affect and so far will the shadow of this Court's ruling extend.

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[14] See, for example, Jackson, J. dissenting in *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, 424-425 (1953), pointing out some of the reasons behind the preferential treatment given seamen by the law.

II.

The second question potentially raised by this petition is whether the classes of beneficiaries named in the Jones Act are mutually exclusive so that, in a wrongful death action, the existence of a beneficiary in one such class precludes recovery by persons in the other class.

It is true, of course, that if Petitioner is successful in her contention under [I], *supra*, that the right to claim under general maritime law and the Ohio Wrongful Death Act is available to her, as a practical matter, this question would become less important, because all of the beneficiaries for whom Petitioner originally sued would be restored to the suit by reason of this Court's reversal of the order of the court below. Clearly, if the Ohio Wrongful Death Act (R. C. § 2125.01, *et seq.*), in conjunction with the doctrine of unseaworthiness, is applicable to the instant action, dependent sisters and brothers as well as a dependent mother may participate as beneficiaries in the same wrongful death action. Section 2125.02, Ohio Revised Code, provides that a wrongful death action "shall be for the exclusive benefit of the surviving spouse, the children and *other next of kin* of the decedent" (emphasis supplied), and this language has been interpreted broadly to include brothers and sisters as well as parents, when both classes of kin are in existence, among the beneficiaries of a single wrongful death action. *Karr v. Sixt*, 146 Ohio St. 527 (1946).

It has been demonstrated that where each of several theories of liability permits recovery for a different class of beneficiaries, recovery by one class upon one theory does not bar the other class from an independent recovery on the other. For example, in *The Four Sisters*, 75 F. Supp. 339 (D. Mass. 1947), the decedent-seaman was unmarried, had no children and was survived by a father, a brother

and a sister. The father-administrator brought suit under the Jones Act for the benefit of decedent's dependent sister and himself. After the suit as to the sister was dismissed by the trial court on the ground that the survival of the father precluded Jones Act recovery for the sister because of the mutually exclusive classes of beneficiaries provided by the FELA, the father recovered a Jones Act verdict. After this judgment was satisfied, he brought suit, as administrator, in admiralty for the sister under the Death on the High Seas Act. *Held:* the sister's action was *not* barred by the prior Jones Act recovery of the father. This decision indicates that where, as here, different theories of liability establish the right of different classes of beneficiaries to recover, recovery may be had by one class on one theory and by the other class on another. Furthermore, any procedural impediment to joining both classes of beneficiaries and both theories of liability in a single action has been removed by the decisions since *The Four Sisters, supra,* which permit the joinder of several theories in one action, with no requirement that the plaintiff elect between them. E.g., *McAllister v. Magnolia Petroleum Co.*, 357 U. S. 221 (1958).

It follows that in the case at bar proof of the Petitioner's allegations will permit recovery under the Jones Act to the Petitioner as the decedent's mother, and under the doctrine of unseaworthiness to the other named beneficiaries.

But even if this Court should rule against Petitioner's claim in [I], *supra*, Petitioner contends that under the Jones Act alone, all of the dependent sisters and brother, as well as the mother of the decedent are entitled to participate in the fund created by recovery for their decedent's wrongful death. It is expressly provided by the F. E. L. A., incorporated by reference into the Jones Act,

that in a wrongful death action under the Act, the decedent's personal representative may recover "for the benefit of the surviving widow or husband and children of such employee; *and*, if none, then of such employee's parents; *and*, if none, then of the next of kin dependent upon such employee * * *." (23) (Emphasis supplied.)

It is true that in *C. B. & Q. R. Co. v. Wells-Dickey Trust Co., Admr.*, 275 U. S. 161 (1927) this Court interpreted this language narrowly as providing exclusive classes of beneficiaries. But in *Poff v. Pennsylvania R. Co.*, 327 U. S. 399 (1946), this language was interpreted broadly to provide, rather than to defeat, recovery for beneficiaries. The liberal purposes of the Act require such broad interpretation of this as well as other language in the Jones Act and F. E. L. A.

Although the court in *Wells-Dickey*, without analysis, found the express language of the F. E. L. A. to clearly demonstrate the congressional intent to provide exclusive compartments of beneficiaries, the holding is not merely a *pro forma* reading of the statute; it required judicial interpretation of a greater degree as well—judicial interpretation which might well have reached a contrary result, in view of the liberal construction required of the F. E. L. A. The use of the connective "and" between the classes of beneficiaries rather than "or" suggests strongly that Congress intended the classes to be cumulative rather than exclusive. The words "if none" have meaning under this construction of the statutory language by inserting an elleptical "even" before those words, demonstrating that all subsequently named classes participate as beneficiaries, "even if none" exist in the prior class. As to the question of how a recovery shall be apportioned among such beneficiaries, the probate machinery of each state (which adequately confers status to sue upon a personal representa-

tive under the same federal acts) provides an equitable and adequate solution.

This statutory construction is at least as valid as that which the Court in *Wells-Dickey* applied, and has the additional advantage of conforming to the spirit of the F. E. L. A. and Jones Act and the liberal construction to which these Acts are entitled.

This Court is urged to re-examine *Wells-Dickey* in this light to give effect to the purposes of this social legislation.

III.

The third question raised in this petition for certiorari is whether a claim for conscious pain and suffering survives the death of a seaman, where the period of pain and suffering for which compensation is claimed is short and immediately preceded his death by drowning.

It must be noted that, in addition to her claim for the decedent's *wrongful death* (Paragraph VII, amended complaint, 30-31), Petitioner also seeks recovery for *conscious pain and suffering of the decedent while he was alive.* (Paragraph VI, amended complaint, 29).

Even if Respondent's contention that unseaworthiness is not an available theory of liability in actions for *wrongful death* were correct (which Petitioner denies, see argument [I] above, pp. 5-15), the language in her complaint which refers to the general maritime law, the doctrine of unseaworthiness and the Ohio Survival Statute, Ohio Revised Code, Sec. 2305.21 *et seq.*, should be retained because she has, in the same action, sought relief, in addition, for *conscious pain and suffering.*

Holland v. Steag, 143 F. Supp. 203 (D. Mass. 1956), so holds. In that case the court held that a state survival statute "appears effective * * * to bring about a survival

of the seaman's right under maritime law to recover for personal injuries caused by the unseaworthiness of the vessel." 143 F. Supp. 203, 206. And see *Just v. Chambers*, 312 U. S. 383 (1941), in which it was held that a state survival statute would permit the survival of a maritime action for personal injuries after the death of the tortfeasor, even though, under the maritime law alone, there would have been no such survival.

But the court below concluded that "there would be no substantial basis, in this case, for a separate estimate of pain and suffering," even "[a]ssuming * * * that a right of action were to pass to decedent's relatives under the Ohio Wrongful Death Act," [15] based upon the language in *The Corsair*, 145 U. S. 335, 348 (1892) that where suffering is brief and "substantially contemporaneous" with death, the decedent's "fright for a few minutes is too unsubstantial a basis for a separate estimation of damage." [16] The language of the amended complaint which the court below dismissed in such summary manner referred to "severe personal injuries which caused [decedent] excruciating pain and mental anguish prior to his death" and sought compensation therefor.

If, at trial, Petitioner is unable to sustain her burden of proof on this issue, her claim for compensation for this portion of her suit should fail for that reason. But she should have the opportunity to make such proof of this contention as she can muster without a prejudgment at the pleading stage that her proof must fail. If the language in *The Corsair* is no longer the position of this Court in view of the developments over the past half-century of tort law with reference to compensability of claims for

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[15] P. 7, Court of Appeals Opinion, Appendix C.

[16] P. 8, Court of Appeals Opinion, Appendix C.

pain accompanied by mental anguish since that decision, this case provides an opportunity to say so.

The imperatives of orderly and symmetrical treatment of maritime claims arising out of the same incident[17] require that this Court emancipate itself and the inferior federal courts from the hoary rule of *The Corsair*.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JACK G. DAY,
BERNARD A. BERKMAN,
Counsel for Petitioner.

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[17] E.g., *Fitzgerald v. United States Lines Co.*, 31 U. S. L. Week 4624 (June 10, 1963).

APPENDIX A.

MERCHANT MARINE ACT OF 1920, SEC. 33.

46 U. S. C. § 688. *Recovery for Injury to or Death of a Seaman.*

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such action shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

FEDERAL EMPLOYERS' LIABILITY ACT.

45 U. S. C. § 51. *Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employees from Negligence; Definition of Employees.*

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her

personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

OHIO WRONGFUL DEATH ACT.

Ohio Revised Code. § 2125.01. *Action for Wrongful Death.*

When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the corporation which or the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it murder in the first or second degree, or manslaughter. When the action is against such adminis-

trator or executor the damages recovered shall be a valid claim against the estate of such deceased person.

When death is caused by a wrongful act, neglect, or default in another state, territory, or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state. Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state, territory, or foreign country.

The same remedy shall apply to any such cause of action now existing and to any such action commenced before January 1, 1932, or attempted to be commenced in proper time and now appearing on the files of any court within this state, and no prior law of this state shall prevent the maintenance thereof.

Ohio Revised Code. § 2125.02. *Proceedings.*

An action for wrongful death must be brought in the name of the personal representative of the deceased person, but shall be for the exclusive benefit of the surviving spouse, the children, and other next of kin of the decedent. The jury may give such damages as it thinks proportioned to the pecuniary injury resulting from such death to the persons, respectively, for whose benefit the action was brought. Except as otherwise provided by law, every such action must be commenced within two years after the death of such deceased person. Such personal representative, if he was appointed in this state, with the consent of the court making such appointment may, at any time before or after the commencement of the suit, settle with the defendant the amount to be paid.

Ohio Revised Code. § 2305.21. *Survival of Actions.*

In addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto.

APPENDIX B.

PLEADINGS AND MOTIONS.

Amended Complaint.

FIRST CAUSE OF ACTION.

I.

Plaintiff, an individual residing in Charlevoix, Michigan, and a citizen of the State of Michigan, brings this action in her representative capacity as the qualified and acting administratrix of the Estate of Daniel Edward Gillespie, deceased, who died on the 25th day of August, 1961, at a time when he was 38 years of age. She is the surviving mother of the deceased and, along with Louis Eugene Gillespie, a brother of the deceased, and Rosanna G. Harvey, Mary Jane Gillespie and Roberta G. Keiser, all sisters of the deceased, constitute the sole and only legal heirs and beneficiaries of the deceased. As administratrix, she brings this action for the benefit of said legal heirs and next of kin, all or part of whom were dependent upon decedent for financial support, pursuant to Section 33 of the Merchant Marine Act of 1920, 41 Stat. 1007; 46 U. S. C. A. Section 688, the General Maritime Law, the Ohio Wrongful Death Act, Ohio Revised Code, Sec. 2125.01 et seq., and the Ohio Survival Statute, Ohio Revised Code Sec. 2305.21 et seq.

II.

During all times herein mentioned, the defendant United States Steel Corporation was the owner of the Steamship "Governor Miller," and used it in the transportation of freight in interstate and foreign commerce. During all times herein mentioned, the defendant, through its Pittsburgh Steamship Division, maintained and operated the Steamship "Governor Miller"; at all times herein mentioned, this defendant, through its National Tube Division, conducted business in and near Lorain, Ohio, and owned, operated and maintained a docking facility on the Black River known as National Tube Dock, Lorain, Ohio; said defendent is incorporated in the State of New Jersey; has its principal place of business in the State of Ohio, and is a resident of the State of Ohio by virtue of its business activities in the City of Cleveland, Ohio.

III.

On or about August 25, 1961, at or near 3:30 P. M., plaintiff's decedent was employed by defendant by and through its Pittsburgh Steamship Division as a seaman on the Steamship "Governor Miller," under articles, for wages and found, while the Steamship was moored to the National Tube Dock in Lorain, Ohio, upon the waters of the Great Lakes.

IV.

Plaintiff's decedent had just returned to the ship from liberty and was standing on the concrete dock to which the ship was moored. There was a deposit of wet ore on the concrete dock; it was dark and raining heavily and a high wind blew in gusts. Plaintiff's decedent assisted another seaman in the employ of this defendant in shifting a moor-

ing cable to assist in the unloading process and then waited to board the vessel after it completed the operation of shifting berth. Before it had completed its shifting operation, a ladder was lowered from the vessel toward the dock for boarding purposes. As plaintiff's decedent reached for the ladder to board the vessel, his feet slipped on the wet ore and wet surface of the dock, he lost his balance, fell into the Black River at the National Tube Dock and drowned. As a proximate result of the negligence of the defendant as described in detail below, decedent lost his life by drowning.

At the time and place herein described, defendant performed or failed to perform the following acts:

(a) It constructed and maintained a docking facility which was slippery when wet.

(b) It constructed and maintained a docking facility which was of such a curved conformation as to prevent vessels from approaching sufficiently close to the dock to use gangplanks of ordinary length for access to the ship from the dock.

(c) It failed to provide adequate barricades along its docking facilities to prevent persons, and this decedent in particular, from falling over the edge into the water.

(d) It permitted loose ore to accumulate along the edge of the docking facilities, when it knew or should reasonably have known that such ore is a dangerous and slippery substance, particularly when wet.

(e) It failed to remove accumulated dirt on the portions of the docking facility so that plaintiff's decedent was required to make his way along the slippery edge of the dock.

(f) It failed to provide plaintiff's decedent with a safe place to work and with safe appliances and equipment with which to work.

(g) It failed to properly illuminate the docking facilities.

(h) It failed to provide plaintiff's decedent with a safe means of access to its ship.

(i) It shifted its vessel in such a manner as to prevent the use of a gangplank as a means of access to its ship from the dock.

(j) It lowered a ladder from its vessel at a time when the ship was not sufficiently secured to the dock to permit safe boarding.

(k) It failed to provide a ladder for boarding the vessel which had guard rails of sufficient length to provide safe access to the ship.

(l) It provided a ladder as a means of access to its vessel from the dock which was defective, unstable, slippery, dangerous and unsafe.

(m) It failed to provide and maintain a watchman or licensed officer to superintend and supervise the shifting operation of the vessel and the attempt of the plaintiff's decedent to board the ship under adverse weather conditions.

(n) It failed to employ a gangplank as a means of access to its vessel from the dock.

(o) It failed to warn plaintiff's decedent of the dangerous and slippery condition of the docking facilities, even though it knew or should reasonably have known that deposits of wet ore were accumulated upon the dock near the edge of the waterway.

(p) Through its agent and employees it ordered plaintiff's decedent to board the vessel in the manner and from the position which he attempted to employ, despite the fact that its agents and employees in command of the vessel and the unloading operation at the National Tube Dock knew or should reasonably have known that the dock surface was wet and slippery, it was dark and rain was falling, and wet, slip-

pery ore had accumulated along the edge of the dock surface.

(q) It failed to provide gear or equipment for the use of plaintiff's decedent to protect him from falling on the slippery and dangerous dock.

(r) It failed to equip its vessel in such a way as to eliminate the necessity of boarding ship in the manner employed by the plaintiff's decedent, from an unlit, unclean, defective and unsafe dock.

V.

The failure of the defendant to provide gear and equipment to permit safe access to its vessel from a slippery, dangerous and unsafe dock and the defendant's failure to equip the ship with devices to eliminate the necessity of boarding the vessel by the ladder and tackle arrangement used, rendered the vessel unseaworthy; such unseaworthiness proximately caused the fall of the plaintiff's decedent from the dock and his resultant death by drowning.

VI.

By reason of the above described occurrence, plaintiff's decedent suffered severe personal injuries which caused him excruciating pain and mental anguish prior to his death; plaintiff says that the fair and reasonable value of the conscious pain and suffering of the decedent prior to his death is in the sum of Fifteen Thousand Dollars ($15,000.00).

VII.

As a direct and proximate consequence of the negligence of the defendant and its breach of its warranty of seaworthiness, plaintiff's decedent, 38 years old, in good health, earning and capable of earning substantial wages

as a seaman, met his death by drowning. His wrongful death has caused substantial pecuniary damage and loss to the legal heirs and beneficiaries of the decedent upon whose behalf this action is brought, in the sum of One Hundred Fifty Thousand Dollars ($150,000.00).

VIII.

Plaintiff further alleges that as administratrix of the Estate of Daniel Edward Gillespie, she has incurred funeral and burial expenses for the decedent in the sum of One Thousand One Hundred Eleven Dollars ($1,111.00).

WHEREFORE, plaintiff prays for judgment against defendant in the aggregate sum of One Hundred Sixty-Six Thousand One Hundred Eleven Dollars ($166,111.00) and her costs.

Motion to Strike.

Now comes the defendant, United States Steel Corporation, and making of each request a separate motion and asking for a separate ruling on each request, moves the Court that an order be entered requiring the plaintiff to strike the following portions of the amended complaint for the respective reasons herein stated:

REQUEST No. 1

That portion of the paragraph marked "I" of the alleged first cause of action, which reads as follows:

> "* * * the General Maritime Law, the Ohio Wrongful Death Act, Ohio Revised Code, Sec. 2125.01 et seq., and the Ohio Survival Statute, Ohio Revised Code, Sec. 2305.21 et seq."

for the reason that said allegation refers to legal remedies which can have no application to this case and, therefore, said allegation is irrelevant, immaterial, incompetent and prejudicial to the defendant.

REQUEST No. 2

The entire paragraph marked "V" of the alleged first cause of action, which paragraph reads as follows:

> "The failure of the defendant to provide gear and equipment to permit safe access to its vessel from a slippery, dangerous and unsafe dock and the defendant's failure to equip the ship with devices to eliminate the necessity of boarding the vessel by the ladder and tackle arrangement used, rendered the vessel unseaworthy; such unseaworthiness proximately caused the fall of the plaintiff's decedent from the dock and his resultant death by drowning."

for the reason that such allegations as are contained in said paragraph marked "V" are predicated upon the doctrine of unseaworthiness, which has no legal application to this case and, therefore, said allegations are irrelevant, immaterial, incompetent and prejudicial to the defendant.

REQUEST No. 3

That portion of the paragraph marked "VII" which reads as follows:

"* * * and its breach of its warranty of seaworthiness"

and that portion which reads:

"his wrongful death"

for the reason that said allegations are based on legal remedies which can have no application to this case and, therefore, said allegations are irrelevant, immaterial, incompetent and prejudicial to the defendant.

REQUEST No. 4

That portion of the paragraph marked "I" of the alleged first cause of action which reads as follows:

"* * * and, along with Louis Eugene Gillespie, a brother of the deceased, and Rosanna G. Harvey, Mary Jane Gillespie, and Roberta G. Keiser, all sisters of the deceased, constitute the sole and only legal heirs and beneficiaries of the deceased. As administratrix, she brings this action for the benefit of said legal heirs and next of kin, all or part of whom were dependent upon decedent for financial support, * * *"

for the reason that the plaintiff is not entitled under the law to bring this action on behalf of the decedent's legal heirs and next of kin when it appears that the decedent left a parent surviving.

REQUEST No. 5

That portion of the paragraph marked "VII" of the alleged first cause of action, which reads as follows:

"* * * has caused substantial pecuniary damage and loss to the legal heirs and beneficiaries of the decedent upon whose behalf this action is brought, * * *"

for the reason that plaintiff is not entitled to bring this action on behalf of decedent's legal heirs and beneficiaries when it appears that the decedent left a parent surviving.

A brief in support of this motion is attached hereto and made a part hereof.

Petition for Writ of Mandamus, Injunction or Other Appropriate Relief, United States Court of Appeals for the Sixth Circuit, No. 15,389.

To the Honorable Judges of the United States Court of Appeals for the Sixth Circuit:

1. Your petitioner, Mabel Gillespie, is an individual residing in Charlevoix, Michigan, and a citizen of the State of Michigan. She is the mother of Daniel Edward Gillespie, deceased, and the duly qualified and acting administratrix

of his estate. She is the plaintiff in a civil action filed in the United States District Court for the Northern District of Ohio, bearing case number C 62-655, entitled "Mabel Gillespie, Administratrix of the Estate of Daniel E. Gillespie, deceased v. United States Steel Corporation."

2. Your petitioner, Mabel Gillespie, is also guardian of Mary Jane Gillespie, an incompetent. Mary Jane Gillespie is the sister of the deceased, wholly dependent upon her decedent brother for support, and a beneficiary named in the amended complaint in the above described action.

3. Your petitioners, Louis Eugene Gillespie, Roberta G. Keiser and Rosanna G. Harvey are brother and sisters of the decedent and named beneficiaries in the amended complaint in the above described action.

4. In the above described action, currently pending in the United States District Court for the Northern District of Ohio, your petitioner Mabel Gillespie, as the personal representative of the decedent, sought damages for the conscious pain and suffering and wrongful death of the decedent from the defendant, United States Steel Corporation. The wrongful death action was brought for the benefit of your petitioners and arose out of the decedent's death while in the employ of the defendant. Recovery was sought pursuant to the Jones Act, Section 33 of the Merchant Marine Act of 1920, 41 Stat. 1007, 46 U. S. C. A. Section 688, as well as under the General Maritime Law, supplemented by the Ohio Wrongful Death Act, Ohio Revised Code, Section 2125.01 et seq. and the Ohio Survival Statute, Ohio Revised Code, Section 2305.21 et seq. A copy of the amended complaint is attached hereto, designated "Exhibit A" and incorporated herein by reference.

5. Defendant responded to the amended complaint by filing a motion to strike all allegations from the complaint which referred to the General Maritime Law, the doctrine of unseaworthiness and the Ohio Statutes noted in paragraph (4) above, as well as all reference to all the named beneficiaries but Mabel Gillespie individually. A copy of the defendant's motion, incorporating its grounds, is attached hereto, designated "Exhibit B" and incorporated herein by reference.

6. Petitioner Mabel Gillespie resisted the motion to strike on the grounds that the general maritime doctrine of unseaworthiness coupled with the state wrongful death act is an alternate theory of liability to the Jones Act for a single recovery for wrongful death of a seaman against his employer and that the other named beneficiaries, the other petitioners here, were entitled to recover as beneficiaries under the state wrongful death statute, which would apply if a finding of unseaworthiness was made at the trial of this cause. A copy of her brief in opposition to the motion to strike, setting out her arguments and authorities is attached, designated "Exhibit C" and incorporated herein by reference.

7. On January 30, 1963, the Honorable Paul Jones of the United States District Court for the Northern District of Ohio granted the defendant's motion to strike in its entirety, thereby eliminating from the case of your petitioner, Mabel Gillespie, individually, the alternate theory of recovery for unseaworthiness and denying entirely the right of these petitioners apart from Mabel Gillespie, individually, to recover for the wrongful death of their brother, the decedent, at the trial of this cause. A copy of the order of the court is attached hereto, designated "Exhibit D" and incorporated herein by reference.

8. The opinion of the Honorable Paul Jones of the United States District Court for the Northern District of Ohio in support of his order which is described in detail and effect in paragraph (7) above and designated "Exhibit D," and from which petitioners seek relief, demonstrated such certitude and conviction in disposing of the substantive issues raised as to preclude the success of any attempt upon the part of your petitioners to obtain an appealable order by virtue of 28 U. S. C. A. § 1292(b), which requires a written statement from the district judge that he is "of the opinion that [his] order involves a controlling question of law *as to which there is substantial ground for difference of opinion.*" (emphasis supplied) A copy of the opinion, dated January 29, 1963, is attached hereto, designated "Exhibit E" and incorporated herein by reference.

9. Upon the conviction that the rights of your petitioners other than Mabel Gillespie have been finally adjudicated adversely to their interests and that the order striking their claims from the amended complaint as described above in paragraph (7) is a final appealable order as to them, on March 1, 1963 your petitioner Mabel Gillespie perfected her appeal to this court by filing notice of appeal in the United States District Court in accordance with the provisions of Rule 73 of the Federal Rules of Civil Procedure.

10. Your petitioners represent to this court that to require them to proceed to trial only upon the claim of your petitioner Mabel Gillespie under the Jones Act alone in advance of their appeal of the order from which they seek relief, thereby eliminating the doctrine of unseaworthiness as an alternative theory of recovery for your petitioner Mabel Gillespie and foreclosing entirely the named beneficiaries apart from Mabel Gillespie, individually, from having their claims litigated in the same jury

proceeding, is unduly oppressive, unjust, expensive and will delay unnecessarily the ultimate determination of this cause.

11. Should the appeal referred to in paragraph (9) above be denied as a non-appealable order, then and in such event, your petitioners urge that they have exhausted, without success, every remedy available to them. To resolve the substantive issues in this case in advance of trial so that a speedy, just and orderly disposition of this cause may be made, your petitioners now ask this court for appropriate extraordinary relief so that their case may proceed to jury trial in a manner which will permit a full and complete determination of the rights of all of your petitioners at one time.

WHEREFORE, petitioners pray that a writ of mandamus, injunction, or other appropriate writ issue out of this Court directed to the Honorable Paul Jones, Judge of the District Court of the United States for the Northern District of Ohio, commanding him, as such judicial officer,

1. to vacate the order entered by him on January 30, 1963, more fully described in paragraph (7) above, and, in addition,

2. to make an order either

(a) denying the motion to strike in all its branches, or, in the alternative,

(b) granting the said motion, incorporating therein the requisite written statement to effectively render his said order appealable within the provisions of 28 U. S. C. A. § 1292(b)

so that the substantive issues affected by the order may be litigated through the appropriate appellate channels in advance of trial in the federal district court, and to do and perform such other acts and things as may be necessary and proper in the premises.

APPENDIX C.

OPINIONS AND JUDGMENTS BELOW.

Memorandum on Motion to Strike of the United States District Court, For the Northern District of Ohio, Eastern Division.

(Filed January 29, 1963.)

Jones, J.:

Upon careful consideration of the motion and briefs filed pro and con in this matter it is my opinion that the motion to strike should be granted in its entirety.

While a litigant may have more than one ground or theory of recovery there can be but one satisfaction and not more than one remedy.

It adds nothing to the right of recovery or the measure of damage that several laws may have supported a seaman's suit.

A reading of the complaint as to the facts and character of the suit spells "Jones Act." The incorporation of the additional legal provisions in the complaint gives no greater right or remedy than that furnished by the Jones Act.

The Jones Act gives complete coverage so far as any remedy is provided in any other legislation and indeed even more. There can be but a single recovery,—one satisfaction. The action must be brought by a legal representative; members of the family of the deceased seaman can not bring single or collective suits for individual or joint recovery.

In my opinion, the criticism of the Supreme Court's decision in Lindgren vs. United States, 281 U. S., page 38, seems a bit captious, and does not add to the orderly and complete legal recovery for wrongful death and other faults resulting in injury and damage to seamen.

An order may be entered carrying this decision into effect.

Order of the United States District Court, Northern District of Ohio, Eastern Division.

(Filed January 30, 1963.)

Upon consideration,

IT IS ORDERED that defendant's motion to strike is granted.

Order of the United States Court of Appeals for the Sixth Circuit, Nos. 15,383 and 15,389.

(Filed July 29, 1963.)

The motion for consolidation of the petition for writ of mandamus, injunction, or other appropriate relief, and of the appeal from the order of the District Court, is hereby granted, and the said petition and appeal are hereby consolidated in this court.

Approved for entry.

Order Denying Motion to Dismiss, United States Court of Appeals for the Sixth Circuit, No. 15,383.

(Filed July 29, 1963.)

It is ORDERED that the motion to dismiss the appeal be and is hereby denied.

Approved for entry.

Order of the United States Court of Appeals for the Sixth Circuit, Affirming the District Court, No. 15,383.

(Filed July 29, 1963.)

It is hereby ORDERED, ADJUDGED AND DECREED that the Order of the District Court, striking from appellant's complaint the allegations relating to the general maritime law doctrine of unseaworthiness, and the allegations relating to the Ohio Wrongful Death Act, be affirmed.

Approved for entry.

Order of the United States Court of Appeals for the Sixth Circuit, Granting Leave to File Petition, No. 15,389.

(Filed July 29, 1963.)

The motion for leave to file the petition for a writ of mandamus, injunction, or other appropriate relief, is hereby granted.

Approved for entry.

Order of the United States Court of Appeals for the Sixth Circuit, Denying Petition, No. 15,389.

(Filed July 29, 1963.)

It is ordered that the petition for writ of mandamus, injunction, or other extraordinary relief be and it is denied.

Approved for entry.

Nos. 15383, 15389

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 15,383

MABEL GILLESPIE, Administratrix of the Estate of Daniel E. Gillespie, Deceased,
Plaintiff-Appellant,

v.

UNITED STATES STEEL CORPORATION, a corporation,
Defendant-Appellee.

MOTION TO DISMISS APPEAL.

No. 15,389

MABEL GILLESPIE, Administratrix of the Estate of Daniel E. Gillespie, Deceased, and Guardian of Mary Jane Gillespie, an incompetent, and LOUIS EUGENE GILLESPIE, ROBERTA G. KEISER, AND ROSANNA G. HARVEY,
Petitioners,

v.

HONORABLE PAUL JONES, Judge of the United States District Court for the Northern District of Ohio,
Respondent.

PETITION FOR A WRIT OF MANDAMUS, INJUNCTION OR OTHER APPROPRIATE RELIEF.

Decided July 29, 1963.

Before WEICK and O'SULLIVAN, Circuit Judges and MCALLISTER, Senior Circuit Judge.

MCALLISTER, Senior Circuit Judge. Appellant, Mabel Gillespie, Administratrix of the Estate of Daniel E. Gilles-

pie, Deceased, filed her complaint against the United States Steel Corporation, as defendant, in the District Court, for the recovery of damages arising out of the death of her decedent, who was a seaman and a member of the crew of one of appellee's steamers, engaged in transportation, as a cargo carrier, on the Great Lakes. The complaint alleged a cause of action based upon three separate grounds: (1) Title 46 U.S.C.A., Section 688 (the Jones Act); (2) the general maritime law (unseaworthiness); and (3) the Ohio Wrongful Death Act.

Appellee filed a motion requesting the District Court to strike from the complaint the allegations relating to the general maritime law doctrine of unseaworthiness, and the allegations relating to the Ohio Wrongful Death Act, for the reason that the appellant's right to recover for the death of her decedent was based exclusively on the Jones Act. Briefs were filed in support of the motion and in opposition thereto. The District Court entered an order granting appellee's motion to strike. From this order, appellant prosecuted an appeal. Appellee filed a motion in this court for an order dismissing the appeal on the ground that the order of the District Court is not a final appealable order and, therefore, that the appeal was premature.

Before the motion to dismiss the appeal was heard by this court, appellant, Mabel Gillespie, filed a petition in this court for extraordinary relief, including a petition for a writ of mandamus, injunction, or other appropriate writ to be issued to the District Court commanding it to vacate the order striking from the complaint the allegations relating to the general maritime law doctrine of unseaworthiness, and the allegations relating to the Ohio Wrongful Death Act; and further commanding the District Court either to enter an order denying the motion to strike, or, in the alternative, granting the motion, and incorporating therein the requisite written statement to render appealable the said order within the provisions of Title 28 U.S.C.A., Section 1292(b). This petition for extraordinary relief was filed not only by Mabel Gillespie as administratrix, but as guardian of Mary Jane Gillespie, an incompetent; and she was joined in the petition by Louis Eugene Gillespie, Roberta G. Keiser, and Rosanna G. Harvey. Mabel Gillespie is the mother of decedent, and the other named petitioners are his brothers and sisters.

The party who initiated the suit, that is, plaintiff-appellant, and the parties who initiated the petition for extra-

ordinary remedy, that is, plaintiff-appellant and petitioners, seeking relief from a single order of the District Court, submit that they will be content if this court reaches the merits of the controversy, by either means, and strongly urge such a decision at this time. For this purpose, they moved to consolidate these appellate matters; and an order granting such motion for consolidation has been granted.[1]

The order of the District Court striking the allegations relating to unseaworthiness under the general maritime law and the Ohio Wrongful Death Act, if interlocutory, is not an appealable order. Title 28 U.S.C.A., Section 1292 confers jurisdiction upon this court to hear appeals in certain instances where interlocutory orders or decrees are involved; but the order of the District Court in this case, which, it is to be said, is not an order in a proceeding in admiralty, does not come within any of the statutory classifications in which this court has jurisdiction of an appeal in an interlocutory decision.[2]

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[1] In their brief, the so-called initiating parties state:

"The unnecessary expense in time and money, the duplication of effort, the frustration of being required to await the verdict in a trial in which one is not a participant and the piecemeal litigation compelled in the trial court, all as a result of appellate inaction now, are self-evident. Add to this the procedural morass involved in the refusal of the lower court to permit alternate claims under the general maritime law as a basis for liability in the wrongful death and conscious pain and suffering counts for those who yet remain in the suit. Consider also the practical possibility that once it has been determined that the questioned beneficiaries are either in or out of this lawsuit it will be easier for counsel on both sides to evaluate the cases for settlement purposes and the necessity for any trial at all may be eliminated. It is readily apparent that appellate intervention at this stage is vital to the parties and will involve less stress upon the judicial machinery than appellate inertia at this stage of the proceedings.

"If this court should consider the controversy on its merits and determine that the order of the court below was erroneous in any respect, that court may be ordered to conform its order to the appellate ruling, the problems listed above will be eliminated, and the matter may proceed to trial in orderly fashion.

"On the other hand, should this court determine that, on the merits, the order of the court below should be affirmed, a multiplicity of suits involving the same subject matter will have been avoided and the suit in the district court may proceed, this highly important issue having been completely resolved in advance of trial."

[2] Title 28 U.S.C.A., Section 1292 provides:

"Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or re-

It is true that according to the statute, as appears in the margin, where a district judge enters an interlocutory order in a civil action, otherwise not appealable, and is of opinion that such order involves a controlling principle of law, as to which there is substantial ground for difference of opinion, and that an immediate appeal may materially advance the ultimate termination of the litigation, he shall so state in writing in such order, and the Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after entry of the order. In the instant case, however, the District Court made no such order as above provided, and this Court did not permit such appeal.

It appears that, on its face, the order of the District Court, striking the allegations from the complaint, is not a final order, but an interlocutory order, and not appealable; and the cases cited by appellee sustain the foregoing proposition. *Lewis* v. *E. I. Du Pont de Nemours & Company, Inc.*, 183 F. 2d 29 (C.A. 5); *Cox* v. *Graves, Knight & Graves, Inc.*, 55 F. 2d 217 (C.C.A. 4). An order striking a portion of the pleadings is not a final order. *Markham* v. *Kasper, et al.*, 152 F. 2d 270 (C.A. 7); *Libbey-Owens-Ford Glass Co.* v. *Sylvania Indust. Corp.*, 154 F. 2d 814 (C.A. 2); *Stewart* v. *Shanahan*, 277 F. 2d 233 (C.A. 8).

However, counsel for appellant persuasively argues that the order of the District Court is not an interlocutory order, but a final order, because of these reasons: the order,

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fusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

striking the allegations in question, entirely eliminated decedent's dependent brothers and sisters as beneficiaries in the wrongful death action based upon unseaworthiness; it removed from the wrongful death count of decedent's mother, the alternate theory of unseaworthiness; and it further removed any right to recover damages for conscious pain and suffering of decedent on the alternate theory of liability for unseaworthiness.

The difficulties of determining what a "final" appealable order is, are ably discussed by counsel for appellant in his brief, which embraces the argument that, even in cases where interim orders are called final, they may be really interlocutory, but have been held appealable solely because of hardship; that where an interim order adversely affects substantial rights which cannot be adequately protected by a subsequent appeal, the hardship rule will be invoked to make such an order final and appealable; and that the provision for appeal only from final decisions should not be so constructed as to deny effective review of a claim fairly severable from the context of a larger litigious process. *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511; *Pabellon* v. *Grace Line*, 191 F. 2d 169, 179 (C.A. 2); *Holdsworth* v. *United States*, 179 F. 2d 933 (C.A. 1); *Forgay* v. *Conrad*, 6 How. 201; *Craighead* v. *Wilson*, 18 How. 199; *U.S. Alkali Export Assn.* v. *United States*, 325 U.S. 196; *Cohen* v. *Beneficial Ind. Loan Corp.*, 337 U.S. 541; *Swift & Co. Packers* v. *Compania Colombiana Del Caribe*, 339 U.S. 684.

The question whether the order of the District Court is an appealable or non-appealable order is a close one. We would, at this time, in the interest of the due and proper administration of justice, prefer to decide the appeal on the merits, if that be possible; and we think it is. Plaintiff-appellant and petitioners ask for a disposition on the merits at this time, and agree to submit the controversy for such a determination; and, while in the regular course, the record, printed indices, and briefs would be filed, and the case placed upon the calendar for argument, we shall proceed to a determination on the merits, since our decision will not prejudice the rights of appellee defendant and respondent, who have not entered a consent to such a disposition.

We are, accordingly, of the view that, in the light of the motion, petition, and arguments advanced in the briefs,

it is proper here to consider and pass upon the contention made by plaintiff-appellant and petitioners that the District Court erred in its order striking from the complaint the allegations basing the cause of action upon the general maritime law of unseaworthiness, and also striking the allegations basing the cause of action on the provisions of the Ohio Wrongful Death Act, leaving the plaintiff only the right to proceed under the Jones Act.

We proceed then to discuss the rights to which plaintiff-appellant and appellees are entitled under the Jones Act; whether they have any remedies under the general maritime law, and the Ohio Wrongful Death Act; whether the hardship rule applies as to interlocutory orders; and whether the motion to dismiss the appeal should be granted or denied.

We start first with the Jones Act. Prior to the Jones Act, 46 U.S.C.A., Section 688, there was no liability for wrongful death under the general maritime law. That law gave no right to recover indemnity for the death of a seaman, although occasioned by the unseaworthiness of the vessel, by negligence, and conferred no right whatever upon his personal representatives to recover damages. *Lindgren* v. *United States*, 281 U.S. 38.

The Jones Act gave a right of action to the personal representatives to recover damages, for and on behalf of designated beneficiaries, for the death of a seaman when caused by negligence. It provides:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The effect of the Jones Act was to incorporate into the maritime law the statute applying to injuries to, and death of railway employees engaged in interstate commerce, known as the Federal Employers' Liability Act, Title 45 U.S.C.A., Section 51, which provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Before proceeding to the other issues in the case, we shall dispose of the claim made for damages resulting from injuries to decedent causing conscious pain, suffering, and mental anguish prior to his death. The complaint alleges: "As plaintiff's decedent reached for the ladder to board the vessel, his feet slipped on the wet ore and wet surface of the dock, he lost his balance, fell into the Black River at the National Tube Dock and drowned"; that "[by] reason of the above described occurrence, plaintiff's decedent suffered personal injuries which caused him excruciating pain and mental anguish prior to his death. . . ." Assuming, at this point, that a right of action were to pass to decedent's relatives under the Ohio Wrongful Death Act, it would seem that there would be no substantial basis, in this case, for a separate estimate of pain and suffering.[3]

[3] In *The Corsair*, 145 U.S. 335, 348, the court said:

"We do not find it necessary to express an opinion whether a libel *in rem* will lie for injuries suffered by the deceased before her death,

Prior to the Jones Act, the general maritime law afforded no remedy by way of indemnity beyond maintenance and cure for the injury to a seaman caused by the mere negligence of a ship's officer or a member of the crew. Nevertheless, the admiralty rule that the vessel and owner were liable to indemnify a seaman for injury caused by the unseaworthiness of the vessel or its appurtenant appliances had been the settled rule long before the enactment of the Jones Act. *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96; *The Osceola*, 189 U.S. 158, 175. By the Jones Act, therefore, Congress created a new cause of action, not then known to maritime law, for bodily injuries to a seaman, or for his death, caused by the negligence of any of the officers, agents, or employees of the ship. Thus, an injured seaman may bring an action claiming damages under the Jones Act for negligence, and, under the general maritime law, for unseawothiness. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221. This, obviously, comes about because, prior to the Jones Act an injured seaman had a federal right in admiralty for an injury caused by unseaworthiness; and to this was added the new cause of action for negligence under the Jones Act.

Appellant, in the District Court, contended that she had the right to maintain an action for damages for the wrongful death of her decedent, a seaman, by reason of the unseaworthiness of the ship, under the general maritime law, as well as for negligence under the Jones Act. In reply, appellee submitted that the right of recovery for wrongful death given by the Jones Act is exclusive and precludes a

a right of action for which passes to the immediate relatives, under the Louisiana statute, since there is no proper averment in the libel to show that such damages were suffered. It is true that the seventh paragraph alleges that from the time the 'tug struck the bank of the river to the time she sunk,' (about ten minutes,) 'and the said Ella Barton was drowned, she, said Ella Barton, suffered great mental and physical pains and shock, and endured the tortures and agonies of death.' But there is no averment from which we can gather that these pains and sufferings were not substantially cotemporaneous with her death and inseparable as matter of law from it. *Kearney* v. *Boston & Worcester Railroad*, 9 Cush. 108; *Hollenbeck* v. *Berkshire Railroad Co.*, 9 Cush. 478; *Kennedy* v. *Standard Sugar Refinery*, 125 Mass. 90; *Moran* v. *Hollings*, 125 Mass. 93. Had she suffered bodily wounds and bruises, from the result of which she lingered and ultimately died, it is possible that her sufferings during her illness would give a separate cause of action; but the very fact that she died by drowning indicates that her sufferings must have been brief, and, in law a mere incident to her death. Her fright for a few minutes is too unsubstantial a basis for a separate estimation of damages."

right of recovery of indemnity for the death of a seaman by reason of the unseaworthiness of the vessel.

In considering these contentions, we refer to the origin and development of the remedy for unseaworthiness. It is a doctrine judicially, rather than legislatively, created; and in *The State of Maryland*, 85 F. 2d 944, 945 (C.A. 4), Judge John J. Parker summarized the history of the remedy.[4]

In *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 538, 544, Mr. Justice Stewart defined the doctrine of unseaworthiness, bringing it down to its latest development, in a notable opinion, in which, speaking for the court, he said: "The earliest mention of unseaworthiness in American judicial opinions appears in cases in which mariners were suing for their wages. They were required to prove the unseaworthiness of the vessel to excuse their desertion or misconduct which otherwise would result in a forfeiture of their right to wages. See *Dixon* v. *The Cyrus*, 7 Fed. Cas.

[4] In the cited case, Judge Parker said:

"Seamen are the wards of admiralty, and the policy of the maritime law has ever been to see that they are accorded proper protection by the vessels on which they serve. In early days, this protection was sufficiently accorded by the enforcement of the right of 'maintenance and cure.' Vessels and their appliances were of comparatively simple construction, and seamen were in quite as good position ordinarily to judge of the seaworthiness of a vessel as were her owners . . .

"With the advent of steam navigation, however, it was realized, at least in this country, that 'maintenance and cure' did not afford to injured seamen adequate compensation in all cases for injuries sustained. Vessels were no longer the simple sailing ships, of whose seaworthiness the sailor was an adequate judge, but were full of complicated and dangerous machinery, the operation of which required the use of many and varied appliances and a high degree of technical knowledge. The seaworthiness of the vessel could be ascertained only upon an examination of this machinery and appliances by skilled experts. It was accordingly held that the duty of the vessel and her owners to the seaman, in this new age of navigation, extended beyond mere 'maintenance and cure,' which had been sufficient in the simple age of sailing ships; that the owners owed to the seamen the duty of furnishing a seaworthy vessel and safe and proper appliances in good order and condition; and that for failure to discharge such duty there was liability on the part of the vessel and her owners to a seaman suffering injury as a result thereof. *The Osceola*, 189 U.S. 158, 175. . . . In the *Edith Godden* (D.C.), 23 F. 43, 46, which dealt with the case of a seaman injured by a defective derrick, Judge Addison Brown pointed out that in dealing with injuries sustained by the use of modern appliances 'it is more reasonable and equitable to apply the analogies of the municipal law in regard to the obligation of owners and masters, rather than to extend the limited rule of responsibility under the ancient maritime law to these new, modern conditions, for which those limitations were never designed.'"

755, No. 3,930; *Rice* v. *The Polly & Kitty*, 20 Fed. Cas. 666, No. 11,754; *The Moslem*, 17 Fed. Cas. 894, No. 9,875. The other route through which the concept of unseaworthiness found its way into the maritime law was via the rules covering marine insurance and the carriage of goods by sea. *The Caledonia*, 157 U.S. 124; *The Silvia*, 171 U.S. 462; *The Southwark*, 191 U.S. 1; I Parsons on Marine Insurance (1868) 367-400.

"Not until the late nineteenth century did there develop in American admiralty courts the doctrine that seamen had a right to recover for personal injuries beyond maintenance and cure. During that period it became generally accepted that a shipowner was liable to a mariner injured in the service of a ship as a consequence of the owner's failure to exercise due diligence.

"This was the historical background behind Mr. Justice Brown's much quoted second proposition in *The Osceola*, 189 U.S. 158, 175: 'That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.' In support of this proposition the Court's opinion noted that '[i]t will be observed in these cases that a departure has been made from the Continental codes in allowing an indemnity beyond the expense of maintenance and cure in cases arising from unseaworthiness. This departure originated in England in the Merchants' Shipping Act of 1876 . . . and in this country, in a general consensus of opinion among the Circuit and District Courts, that an exception should be made from the general principle before obtaining, in favor of seamen suffering injury through the unseaworthiness of the vessel. We are not disposed to disturb so wholesome a doctrine by any contrary decision of our own.' 189 U.S., at 175. . . .

"In 1944 this Court decided *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96. While it is possible to take a narrow view of the precise holding in that case, the fact is that *Mahnich* stands as a landmark in the development of admiralty law. Chief Justice Stone's opinion in that case gave an unqualified stamp of solid authority to the view that *The Osceola* was correctly to be understood as holding that the duty to provide a seaworthy ship depends not at all upon the negligence of the shipowner or his agents. Moreover, the dissent in *Mahnich* accepted this reading of *The Osceola* and claimed no more than that the injury in

Mahnich was not properly attributable to unseaworthiness. See 321 U.S., at 105-113.

"In *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, the Court effectively scotched any doubts that might have lingered after *Mahnich* as to the nature of the shipowner's duty to provide a seaworthy vessel. The character of the duty, said the Court, is 'absolute.' 'It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. . . . It is a form of absolute duty owing to all within the range of its humanitarian policy.' 328 U.S., at 94-95. The dissenting opinion agreed as to the nature of the shipowner's duty. '[D]ue diligence of the owner,' it said, 'does not relieve him from this obligation.' 328 U.S., at 104.

"From that day to this, the decisions of this Court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care. . . .

"There is ample room for argument, in the light of history, as to how the law of unseaworthiness should have or could have developed. Such theories might be made to fill a volume of logic. But, in view of the decisions in this Court over the last 15 years, we can find no room for argument as to what the law is. What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history."

However, all of the foregoing is concerned with damages growing out of a claim of unseaworthiness resulting in *injuries* to a seaman, rather than indemnity for his *death* resulting from unseaworthiness, or, —in the case of *The Tungus*—for the death of a person who was not a seaman, and therefore, not under the Jones Act; and the foregoing adjudications are here referred to because of the contention in the District Court that the rule relating to the unseaworthiness of a vessel, resulting in injuries to a seaman, should also apply in case of his death resulting from such unseaworthiness.

While, prior to the Jones Act, a vessel and owner were liable to indemnify a seaman for injuries caused by unseaworthiness, nevertheless, before the passage of that Act,

the vessel and owner were not, under federal or maritime law, liable for the *death* of a seaman occasioned by unseaworthiness and negligence. *Lindgren* v. *United States*, 281 U.S. 38. Long before the *Lindgren case*, in *The Harrisburg*, 119 U.S. 199, it was held that, in the absence of an act of Congress or a statute of a State giving a right of action therefor, a suit in admiralty cannot be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or on waters navigable from the sea, which is caused by negligence.

This seems a somewhat harsh rule for the Admiralty to apply to its wards, of which it is customarily said it has such tender and protective feeling; and Mr. Justice Brennan in his opinion, partly dissenting and partly concurring, in *The Tungus* v. *Skovgaard*, 358 U.S. 588, 599, commented upon the holding of *The Harrisburg*, supra, saying that it was based largely on an application of the harsh common-law principle, and that, in the absence of an appropriate statute, there was no civil remedy for wrongful death. Nevertheless, he declared that "*the holding has become part and parcel of our maritime jurisprudence.*[5] But its harshness was averted by the practice in admiralty of drawing on the state wrongful death statutes to furnish remedies for federal maritime torts." (Emphasis supplied) In *The*

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[5] Prior to *The Tungus* v. *Skovgaard*, supra, Mr. Justice Brennan had occasion to outline the basis of liability for unseaworthiness in *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 428, involving the Jones Act, in which he stated:

"[The] remedy for unseaworthiness derives from the general maritime law, and that law recognizes no cause of action for wrongful death whether occasioned by unseaworthiness or by negligence. *The Harrisburg*, 119 U.S. 199; see *Western Fuel Co.* v. *Garcia*, 257 U.S. 233, 240. Before the Jones Act, federal courts of admiralty resorted to the various state death acts to give a remedy for wrongful death. *The Hamilton*, 207 U.S. 398; *The Transfer No. 4*, 61 F. 364; see *Western Fuel Co.* v. *Garcia*, supra, at 242; *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U.S. 479. The Jones Act created a federal right of action for the wrongful death of a seaman based on the statutory action under the Federal Employers' Liability Act. In *Lindgren* v. *United States*, 281 U.S. 38, the Court held that the Jones Act remedy for wrongful death was exclusive and precluded any remedy for wrongful death within territorial waters, based on unseaworthiness, whether derived from federal or state law. The petitioner assumes that under today's general maritime law the personal representative of a deceased seaman may elect, as the seaman himself may elect, between an action based on the FELA and an action, recognized in *The Osceola*, 189 U.S. 158, 175, based upon unseaworthiness. In view of the disposition we are making of this case, we need not consider the soundness of this assumption. . . .

"In denying the claim the lower courts relied upon their views of general tort doctrine. It is true that at common law the liability of

Tungus case, supra, the decedent was not a seaman, but an employee of an oil company, working on the ship; and his death did not occur on the high seas, thereby excluding the Death on the High Seas Act, if that statute had otherwise been applicable. It was held in *The Tungus case* that a claim for unseaworthiness was encompassed by the New Jersey Wrongful Death Act, which could be applied by a court in admiralty; and it was pointed out by Mr. Justice Stewart, speaking for the court: "Although Congress has enacted legislation, notably the Jones Act and the Death on the High Seas Act, providing for wrongful death actions in a limited number of situations, *no federal statute is applicable to the present case.*" (Emphasis supplied) The court accordingly applied the New Jersey Wrongful death statute and concluded that a claim for unseaworthiness, because of the negligent failure on the part of the ship and owner to provide plaintiff's decedent with a reasonably safe place to work, was encompassed by the New Jersey Wrongful Death Act, which gave a right of action for "death by wrongful act." Mr. Justice Stewart, however, during the course of his opinion in *The Tungus case*, stated: "We begin as did the Court of Appeals with the established principle of maritime law that in the absence of a statute there is no action for wrongful death. *The Harrisburg*, 119 U.S. 199." (p. 590)

What the Jones Act established was a modification of the prior maritime law, and a new rule of general application in reference to the liability of owners of vessels for

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the master to his servant was founded wholly on tort rules of general applicability and the master was granted the effective defenses of assumption of risk and contributory negligence. This limited liability derived from a public policy, designed to give maximum freedom to infant industrial enterprises, 'to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost—to someone—of the doing of industrialized business.' *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 59. But it came to be recognized that, whatever the rights and duties among persons generally, the industrial employer had a special responsibility toward his workers, who were daily exposed to the risks of the business and who were largely helpless to provide adequately for their own safety. Therefore, as industry and commerce became sufficiently strong to bear the burden, the law, the reflection of an evolving public policy, came to favor compensation of employees and their dependents for the losses occasioned by the inevitable deaths and injuries of industrial employment, thus shifting to industry the 'human overhead' of doing business. For most industries this change has been embodied in Workmen's Compensation Acts. In the railroad and shipping industries, however, the FELA and Jones Act provide the framework for determining liability for industrial accidents."

injuries to seamen; it superseded all state legislation on that subject; and the right of action given by the Jones Act to the personal representative to recover damages *for and on behalf of designated beneficiaries* for the death of a seaman when caused by negligence, is exclusive, and precludes a right of recovery of indemnity for the death by reason of the unseaworthiness of the vessel, irrespective of negligence, notwithstanding that right might be predicated upon the death statute of the State in which the injury was received. *Lindgren* v. *United States*, 281 U.S. 38.

While any seaman who shall suffer personal injury in the course of his employ may, at his election, maintain actions under the maritime law to recover for personal injuries occasioned by the unseaworthiness of the vessel, and under the Jones Act, for injuries caused by negligence, nevertheless, the personal representative of a deceased seaman had no right of action under the prior maritime law; and therefore, the right of action given a personal representative, under the Jones Act, to recover damages for the seaman's death when caused by negligence, for and on behalf of designated beneficiaries, is necessarily exclusive and precludes the right of recovery of indemnity for his death by reason of the unseaworthiness of the vessel.[6] It is clear that, so long as Congress had not exercised the power given it under the commerce clause of the Constitution with respect to the liability in such cases, the states might occupy the field; but as soon as Congress acted, the legislation of the states was superseded, and that of Congress became supreme and exclusive. Congress, having exercised the power given to it under the commerce clause of the Constitution, by enacting the Jones Act, covering fully the right of the personal representative of a seaman to recover from an employer for injury resulting in death, thereby superseded all state legislation bearing upon the subject. *United States* v. *Lindgren*, 28 F. 2d 725 (C.A. 4th).[7]

[6] It is to be noted that an injured seaman cannot be required to exercise an election between his remedies for negligence under the Jones Act and for unseaworthiness. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 222.

[7] See *The Minnesota Rate Cases*, 230 U.S. 352, 398, 399, in which Mr. Justice Hughes, speaking for the Court, said:

> "Interstate carriers, in the absence of Federal statute providing a different rule, are answerable according to the law of the State for nonfeasance or misfeasance within its limits. . . . Until the enactment by Congress of the act of April 22, 1908, c. 149, 35 Stat. 65, the laws of the States determined the liability of interstate carriers [to]

In *Turcich* v. *Liberty Corp.*, 119 Fed. Supp. 7, 11 (E.D. Pa.), in an order denying a new trial, the District Court discussed unseaworthiness occasioned by negligence as well as the absolute duty to see that the vessel was seaworthy, for the breach of which, without regard to negligence, the injured seaman might recover, since the general maritime law makes the owners liable for such losses. But the court went on to say that the doctrine of unseaworthiness as announced by the Supreme Court, related only to the seaman's own right to recover for personal injuries occasioned by the unseaworthiness of the vessel, and conferred no right whatever upon his personal representative to recover indemnity for his death; and that, until the Jones Act, there was no Federal right of action for the wrongful death of a seaman caused by negligence. The court, however, pointed out:

> "The gist or gravamen of an action under the Jones Act is negligence. In order to maintain an action under the Act, the seaman or his personal representative must allege and prove negligence, for unless the seaman or his personal representative can establish negligence of the owners of the vessel or her officers, agents or employees, no liability exists. The negligence of the owners of the vessel may consist in the failure to supply and maintain a seaworthy vessel, properly equipped and manned or the negligence of the master or members of the crew, as provided in the Act."

The survival provisions of the Jones Act apply to an action brought by the personal representative of a deceased seaman, whose death was occasioned by a shipowner's negligent failure to comply with the absolute duty to furnish a seaworthy vessel. *Fall, Admx.* v. *Esso Standard Oil Company*, 297 F. 2d 411, 417 (C.A. 5). Moreover, in

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railroad for injuries received by their employes while engaged in interstate commerce, and this was because Congress, although empowered to regulate the subject, had not acted thereon. In some States the so-called fellow-servant rule obtained; in others, it had been abrogated; and it remained for Congress, in this respect and in other matters specified in the statute, to establish a uniform rule." See also *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 216, defining and giving instances as to how far the general maritime law may be changed or affected by state legislation. In *Kibadeaux* v. *Standard Dredging Co.*, 81 F. 2d 670, 672 (C.A. 5), Judge Sibley referred to these instances as "vexing distinctions."

Kernan, Adm'r. v. *American Dredging Company*, 355 U.S. 426, the court held that, under the Jones Act, which incorporates the provisions of the Federal Employers' Liability Act, a seaman's employer was liable, without a showing of negligence, for his death resulting from a violation of the Coast Guard regulations pertaining to navigation. In arriving at this conclusion, the court referred to the fact that its decisions under the Federal Employers' Liability Act, based upon violations of the Safety Appliance Act or the Boiler Inspection Act, established that a violation of either Act created liability without regard to negligence, if the violation, in fact, contributed to the death or injury, irrespective of whether the injury flowing from the breach was the injury which the statute sought to prevent; and that the Jones Act expressly provided for seamen the cause of action—and consequently the entire judicially developed doctrine of liability—granted to railroad workers under the Federal Employers' Liability Act.

Plaintiff-appellant submits that the statement of the court in *Lindgren* v. *United States*, 281 U.S. 38, that the personal representative of a deceased seaman could not, under the general maritime law, recover indemnity for the death of a seaman, was only dicta; and appellant refers to the remark of Mr. Justice Brennan in *The Tungus* v. *Skovgaard*, 358 U.S. 588, 606, in his opinion, concurring in part, and dissenting in part, in which he says that the opinion in *Lindgren* v. *United States*, supra, "dealt primarily with the effect of the Jones Act's wrongful death provision in removing the seaman's right to invoke the remedies of state Death Acts for the identical gravamen of negligence. And, although the libel did not allege unseaworthiness, the Court briefly observed that the Jones Act's death provision would be construed equally as foreclosing a state statute's use on that count." It is true that the libel in the *Lindgren case* did not allege unseaworthiness; but the matter was there before the court, since decedent left no survivors entitled to maintain an action under the Jones Act, and counsel for the administrator urged, in the language of the opinion of the court, "that the right of action given the personal representative by the Merchant Marine Act is not exclusive, and that it neither supersedes the right of action given him by the death statute of the State in which the injury was sustained, nor precludes his right to recover indemnity for the death under the old

admiralty rules on the ground that the injuries were occasioned by the unseaworthiness of the vessel." The court said, however: "These contentions cannot be sustained."

It does not appear that the language in the *Lindgren case*, referred to by counsel for appellant, was dicta, for the reason that the matter was before the court, in the *Lindgren case*; was argued before the court; and was passed upon by the court. Moreover, the Supreme Court in *The Tungus case*, supra, declared that it was an established principle of maritime law that, "in the absence of a statute there was no action for wrongful death" (p. 590); and in *Kernan* v. *American Dredging Company*, 355 U.S. 426, the court said that the remedy for unseaworthiness derives from the general maritime law, and that law recognizes no cause of action for wrongful death, whether occasioned by unseaworthiness or by negligence. (p. 428) The Court of Appeals for the Fifth Circuit on this point observed: "We feel compelled to hold that the general maritime law, unaided by the Jones Act, anomalously, archaically, unnecessarily in terms of general principles, gives (plaintiff) no right of action." *Fall, Adm'x.* v. *Esso Standard Oil Co.*, 297 F. 2d 411, 417.

We are of the view that the right of plaintiff-appellant rests solely on the Jones Act. As administratrix of the deceased seaman, she would have had no right of action for negligence, or under the general maritime law for unseaworthiness, resulting in his death, prior to the Jones Act. That statute gave an action for damages for death resulting from negligence,* and the damages were limited to the deceased employee's "personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next-of-kin dependent upon such employee. . . ." As Judge John J. Parker said in *United States* v. *Lindgren*, 28 F. 2d 725, 727: "The statute which was thus incorporated into the maritime law, and which conferred upon the injured seaman, or his representative, if his injury resulted in death, rights which might be enforced either in an action at law or a suit in admiralty, clearly provides that there can be a recovery in

* It is to be emphasized that the Jones Act gives an action for damages for death resulting from negligence as well as for death, without regard to negligence, where a violation of statutes or regulations contributes to the death. *Kernan* v. *American Dredging Co.*, 355 U.S. 426.

case of death only where there is a showing of dependency. . . . And, in the light of the authorities cited above, we think that the statute must be deemed exclusive and to supersede all state legislation bearing upon the subject."

Counsel for plaintiff-appellant argues that the rule in *Lindgren* v. *United States*, supra, is to be disregarded on the ground that it has become eroded, overrun by the decided cases in contiguous areas, and that the Supreme Court has already indicated that it will determine in the future that an action will lie for the wrongful death of a seaman caused by unseaworthiness, without regard to the Jones Act. To buttress this contention, counsel refers to *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 429-430, where the court, speaking through Mr. Justice Brennan, said:

> "The petitioner assumes that *under today's general maritime law* the personal representative of a deceased seaman may elect, as the seaman himself may elect, between an action based on the FELA and an action, recognized in *The Osceola*, 189 U.S. 158, 175, based upon unseaworthiness. *In view of the disposition we are making of this case, we need not consider the soundness of this assumption.*" (Emphasis supplied)

It is submitted that the foregoing indicates that the court may now be considering the reversal of the rule that the personal representative of a deceased seaman is limited to damages under the Jones Act, and that he may, in the future, bring an action based upon unseaworthiness under the general maritime law. See *Schlichter* v. *Port Arthur Towing Co.*, 288 F. 2d 801, 806 (C.A. 5); see also Mr. Justice Brennan's opinion, dissenting in part and concurring in part, in *The Tungus* v. *Skovgaard*, 358 U.S. 588, 597, 611, to which reference was made in *Fitzgerald* v. *United States Lines*, . . . U.S. . . . (decided June 10, 1963). However, if the prior rule is no longer accepted by the Supreme Court, and *Lindgren* v. *United States*, supra, is to be overruled, the landmarks must be plainer to see; and it would be unbecoming for this Court to base its determination upon the assumption that the holding in *Lindgren* is to be reversed. It has been said that *The Harrisburg*, 119 U.S. 199, "was decided long before the cause of action for unseaworthiness reached its present mature state, recognized as being federal in its origin and incidents."

Justice Brennan's opinion, dissenting in part, and concurring in part in *The Tungus* v. *Skovgaard*, 358 U.S. 588, 605. In the same case, Mr. Justice Brennan also said: "Admiralty law is primarily judge-made law. The federal courts have a most extensive responsibility of fashioning rules of substantive law in maritime cases. (p. 611)"[9] But he added that the holding that, in the absence of an appropriate statute, there was no civil remedy for wrongful death, "*has become part and parcel* of our maritime jurisprudence." (Emphasis supplied.) This, it is to be remarked, was subsequent to the *Kernan case*, upon which plaintiff-appellant places such store. In *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 550, Mr. Justice Frankfurter, in the course of a dissenting opinion, remarked: "No area of federal law is judge-made at its source to such an extent as is the law of admiralty"; and in *Fitzgerald* v. *United States Lines*, supra, Mr. Justice Black said that: "Article III of the Constitution vested in the federal courts jurisdiction over admiralty and maritime cases, and since that time, the Congress has largely left to this court the responsibility for fashioning the controlling rules of admiralty law."[10] Nevertheless, when Congress has exercised its powers in the admiralty and maritime field, such as in the enactment of the Jones Act, that statute would seem controlling, whatever may be other developments of judge-made admiralty or maritime law. This conclusion would appear to follow since Congress has acted in a specific field; has provided a special remedy and no other; and has restricted recovery of damages to designated dependent bene-

[9] Such a responsibility is, perhaps, not limitless. In *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 221, Mr. Justice Holmes observed: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common-law rules of master and servant and propose to introduce them here *en bloc*."

[10] In the *Fitzgerald case* the court said that the Seventh Amendment did not require jury trials in admiralty cases, nor did that amendment nor any other provision of the Constitution forbid them; nor did any statute of Congress or Rule of Procedure, Civil or Admiralty, forbid jury trials in maritime cases. The court held that a seaman was entitled to a jury trial on a maintenance and cure claim joined with a claim for Jones Act negligence when both arose out of the same facts. The proposition is now established, but the difficulties in arriving at such a determination are evidenced in the dissenting opinion of Mr. Justice Harlan, and the three differing opinions of the Court of Appeals of the Second Circuit, whose decision was reversed.

ficiaries. Moreover, it is to be observed that in the *Kernan case*, it was held that liability for the death of the seaman depended entirely on the Jones Act; in *The Tungus case*, the decedent was not a seaman and had no rights under the Jones Act; and in the *Fitzgerald* case, the claim was, under the Jones Act, for damages resulting in injuries to a seaman. None of these cases was for indemnity for the death of a seaman, occasioned by unseaworthiness, under the general maritime law, or under a state Wrongful Death Act; and what is said in these cases can hardly be taken to mean that the heretofore settled law is to be overruled, and that a personal representative has a right of action for indemnity for the death of a seaman occasioned by an unseaworthy vessel, under the maritime law, and also under a state Wrongful Death Act, as well as under the Jones Act.

In the Jones Act, Congress gave a federal right of action to the personal representative of a seaman whose death resulted from negligence, for the benefit of specified dependents. No such right had previously existed. Congress having, by the Jones Act, pre-empted the field relating to recovery of damages for the death of a seaman, that statute must be deemed to supersede all state legislation bearing on the subject and to be the exclusive remedy in such a case.

It is to be noted that all of the allegations of the complaint upon which plaintiff bases her claim for indemnity constitute assertions of negligence. As plaintiff, in her complaint, states: "As a proximate result of the negligence of the defendant as described in detail below, decedent lost his life by drowning." Whether the negligence was failure to provide safe access to the ship for plaintiff's decedent, or whether the negligence was a breach of defendant's duty to provide a seaworthy ship, the action is based upon negligence and proximate cause, and, on the proof thereof, plaintiff would be entitled to a judgment. As personal representative of her decedent, plaintiff could maintain the suit and recover under the Jones Act. The only difference between a recovery under the Jones Act and a recovery under the maritime law for unseaworthiness, or under the Ohio Wrongful Death Act, is that, under the Jones Act, the recovery is limited to certain designated dependent beneficiaries, as provided by that statute, and under the maritime law and the Ohio Wrongful Death Act, other persons,

including dependents or non-dependents would have rights of indemnity.

In accordance with the controlling adjudications and in the light of the circumstances disclosed in this case, the exclusive remedy for indemnity for the death of plaintiff's decedent is through an action brought by the personal representative under the Jones Act. Because of such exclusive remedy, petitioners in Case No. 15,389 have no right of action under the general maritime law for unseaworthiness or under the Ohio Wrongful Death Act. Having no such rights, the hardship rule applicable to interlocutory orders, resulting in their being considered as appealable orders, would not, in any event, be relevant.

Under the foregoing circumstances, the need for the issuance of a writ of mandamus, injunction, or granting of a petition for other extraordinary remedy, under given appropriate circumstances, disappears. As heretofore said, ordinarily, we would not have reached the merits of this controversy except after a hearing of the appeal. However, because of petitioners' prayer for extraordinary relief, we have duly examined all the related questions, and also because of plaintiff's and petitioners' request and consent, we have considered and determined the controversy on the merits as though it were submitted on an appeal; and our determination is not prejudicial to appellee and respondent, who have not so consented. It is our conclusion that an order be entered in Case No. 15,389 denying the petition for a writ of mandamus, injunction, or other extraordinary relief; that an order be entered in Case No. 15,383 denying the motion to dismiss the appeal; and that the order of the District Court, striking from appellant's complaint the allegations relating to the general maritime law doctrine of unseaworthiness, and the allegations relating to the Ohio Wrongful Death Act, be affirmed.